

# **EXHIBIT SS**



## Lessons From A Circuit Mediator

- How to avoid and resolve conflict: negotiate with success; observations from a mediator
- Edward G. Smith, Chief Circuit Mediator
- Cynthia R. Mabry-King, Circuit Mediator
- Fourth Circuit Workplace Conduct Conference
- Richmond, Virginia
- May 22, 2019

**A. Initiating a Proceeding; Formal Request for Counseling**


An employee who believes that his or her rights under Chapters II through VIII of this Plan have been violated *must first request counseling.*

Current  
Mandatory  
Counseling  
Requirement




#### A. Initiation

Within 15 days after receipt by the employee of the notice of the conclusion of the counseling period, the employee may file a request for mediation with the EDR Coordinator. The request must be made in writing and must state the claim(s) presented (copy of approved form is contained in Appendix). The EDR Coordinator shall promptly provide a copy of the request for mediation to the unit executive and the Chief Judge of the Court. **Failure to pursue mediation will preclude further processing of the employee's claim** under any other provisions of this Chapter.



Current Mandatory Mediation Requirement



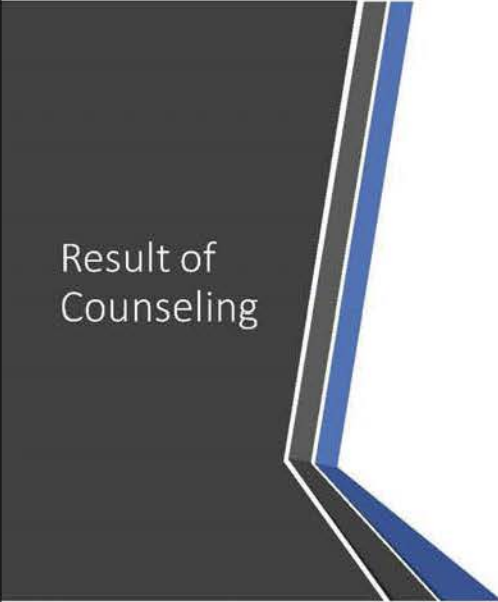
## Counseling vs. Mediation

### Purposes of Counseling

- The purposes of the counseling shall be to discuss the employee's concerns and elicit information regarding the matter...to evaluate the matter; and to assist the employee in achieving an early resolution of the matter, if possible.

### Purposes of Mediation

- The mediator shall consult separately and/or jointly with the employee and his or her representative, if any, and the employing office to discuss alternatives for resolving a dispute, including any and all possibilities of reaching a voluntary, mutually satisfactory resolution.



Result of  
Counseling



## OPTIONS FOR RESOLUTION

The goal of the Judiciary is to address wrongful conduct as soon as possible and to provide flexible options for doing so. Employees who experience, observe, or learn of wrongful conduct, or who otherwise believe their employment law rights have been violated, have a number of options for addressing such conduct, any of which may lead to resolution. Employees should select the option(s) that best fit their needs and comfort level.

**Plan Options.** This Plan provides for three options to address wrongful conduct, and each is explained in detail below:

- ☐ Informal Advice
- ☐ Assisted Resolution
- ☐ Formal Complaint



### Assisted Resolution

An Employee may contact an EDR Coordinator or Circuit Director of Workplace Relations to request Assisted Resolution to address wrongful conduct.

Assisted Resolution is an interactive, flexible process that may include:

- discussing the matter with the person whose behavior is of concern;
- conducting a preliminary investigation, including interviewing witnesses to the conduct;
- engaging in voluntary mediation between the parties;
- assessing whether any interim remedial measures are necessary; and
- resolving the matter by agreement.

## Effect of Proposed Plan Revisions

- Greater Potential for Resolution Before Entrenchment Sets In



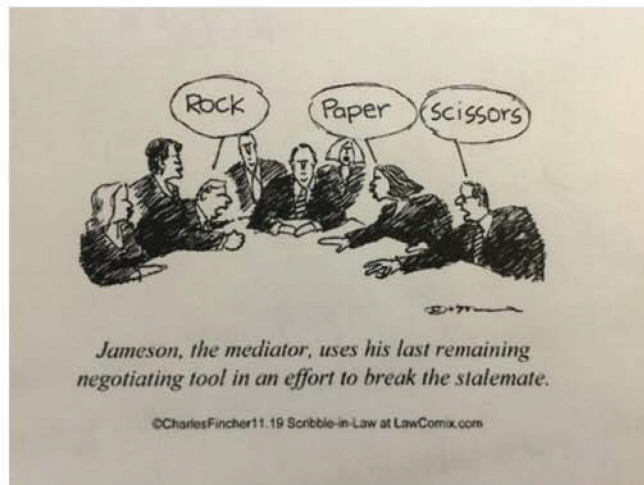
## Fourth Circuit Mediation Settlement Rate

	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>
Overall	33%	32%	32%	36%	40%
Title VII	31.6%	23.3%	16.7%	23.1%	28.6%
Difference	-1.4%	-8.7%	-15.3%	-12.9%	-11.4%

Every  
Problem Has  
A Solution







We allow appropriate venting time.

We diffuse employee negativity.


We shift the direction of the discussion to potential resolutions.

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We Manage  
Negativity  
Early In The  
Process







**We educate**

- Discuss the actual remedies that are available under the EDR Plan
- Disabuse them of the notion that there will be a monetary payment in ALL cases, even when there has been clear wrongdoing

## Remedies

1. Placement of an employee in a position denied;
2. Placement in a comparable alternative position;
3. Reinstatement to a position from which previously removed;
4. Prospective promotion to a position;
5. Priority consideration for a future promotion or position;
6. Back pay and associated benefits...Back Pay Act
7. Records modification and/or expungement;
8. Equitable relief, such as temporary stays of adverse actions;
9. Granting of family and medical leave; and
10. Accommodation of disabilities...

## Remedies which are not legally available



PAYMENT OF  
ATTORNEYS' FEES  
...UNLESS UNDER THE  
BACK PAY ACT



COMPENSATORY  
DAMAGES; AND



PUNITIVE DAMAGES





We listen for:

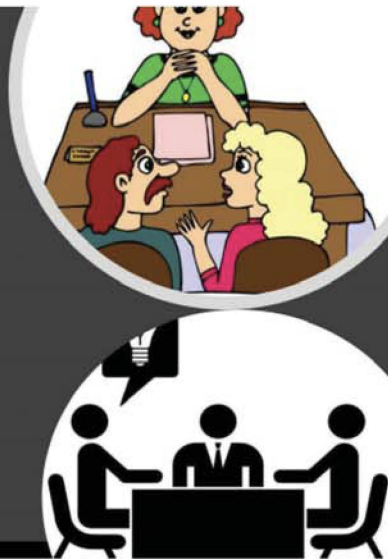
Potential areas for settlement

Confidential aspects of the discussion

Information that may be helpful for the other side to understand and appreciate that may lead to resolution

## Mediators assist participants in generating ideas for resolution through . . .

- An understanding of the mediator's role: not to decide whether there was misconduct or the resolution
- Exploring and understanding of participants' interests and needs
- Confidentially sharing information about how others resolved similar disputes





## **We ask questions.**

- Our questions are designed to get the participant to think about:
  - The future rather than the past
  - Settlement possibilities
  - Risks of proceeding
  - Whether she/he really has better alternatives to settlement

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## Questions & Answers

Office of Circuit Mediation

<http://www.ca4.uscourts.gov/mediation>